No. 84-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,
Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. The purpose of APA, as set forth in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all branches in the broadest and most liberal manner." A substantial and growing number of APA's member psychologists are health-care providers licensed to provide mental health services to individual clients.

APA has participated frequently as an *amicus* in this Court, including its recent participation in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

The appeal in No. 84-495, *Thornburgh v. American College of Obstetricians and Gynecologists*, raises three issues that are of particular interest to APA and its members. The first is the extent to which a State may intrude on the discretion of health professionals engaged in pre-abortion counseling to provide information appropriate to the needs and circumstances of individual women seeking abortions. The second issue involves the scope of the definition accorded "medical risk" by the Pennsylvania Legislature in setting forth the degree of care required of physicians in performing post-viability abortions. The third issue of interest to APA is the competence of minors to consent to abortions. APA submits this *amicus* brief to bring to the Court's attention relevant empirical studies that will not be addressed by the parties.

This brief is filed pursuant to Rule 36.2 of the Rules of this Court. The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises several issues relative to the Pennsylvania Abortion Control Act[1] ("the Act") that this Court has addressed in prior decisions dealing with abortion. Although APA presents arguments regarding three of the issues raised on this appeal, proper resolution of two of those issues—the statute's informed consent requirements and the definition of "medical risk"—requires only that the Court reaffirm its earlier holdings. The informed consent provisions at issue in this case are strikingly similar to those provisions struck down in *City of Akron v. Akron Center for Reproductive Health*, 462

[1] 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1982).

U.S. 416 (1983), and suffer from the same constitutional infirmities noted by this Court in that opinion. Similarly, in view of this Court's holding in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), that "[maternal] health" and "medical judgment" should be broadly construed to include "[a]ll . . . factors relevant to the well-being of the patient," including "psychological" and "emotional" factors, the provision of the Act which precludes consideration of psychological and emotional factors in assessing the medical risks to pregnant women arising from particular abortion techniques is impermissibly restrictive.[2] *See also Colautti v. Franklin*, 439 U.S. 379 (1979).

With respect to the third issue addressed in this brief —the parental/judicial consent provisions of the Act— the plurality opinion of this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), makes clear that the parental attendance provisions of the implementing Rules[3] impermissibly burden the rights of both mature and immature minors to seek abortions.

In addition, regarding the larger issue of the competence of minors to give informed consent to abortion, APA urges this Court to extend to adolescent women, as implicit in their fundamental right of personal privacy, the full right to "deci[de] whether or not to terminate [one's] pregnancy." *Roe v. Wade*, 410 U.S. 113, 153

[2] Although the court of appeals did not expressly address this issue, it was raised by the plaintiff-appellees in their Complaint. APA advances this argument as an additional ground for affirming the court of appeals' judgment that § 3210(b) is unconstitutional. In the alternative, should the Court determine that, but for this issue, reversal is otherwise appropriate, APA urges the Court to remand to the court of appeals in order to give that court an opportunity to decide whether the statutory construction of "medical risk" is so narrow as to render § 3210(b) unconstitutional on that ground.

[3] Section 3206 of the Act required the Pennsylvania Supreme Court to promulgate rules implementing the provisions of the Act governing the alternative judicial proceedings by which minors may seek authorization for abortions. *See infra* at III.A.

(1973). This argument is supported by the growing body of methodologically sound and generally accepted psychological research which concludes that minors fourteen years of age and older generally possess the ability to understand treatment alternatives and their attendant risks and benefits, as well as the demonstrated capacity for rational decisionmaking, to a degree that is not measurably different from that of adults. In view of these scientific findings, APA urges this Court to adopt for women fourteen years of age and older a presumption of competence to make reasoned abortion decisions and to give informed consent, and to extend to those women the full constitutional protections this Court already has extended to women eighteen years of age and older.

ARGUMENT

I. THE MANDATORY PROVISIONS OF § 3205 OF THE ACT IMPERMISSIBLY INTRUDE ON THE DISCRETION OF A PREGNANT WOMAN'S PHYSICIAN TO ENSURE EFFECTIVE COUNSELING AND UNDULY INTERFERE WITH A WOMAN'S CONSTITUTIONAL RIGHT TO MAKE DECISIONS CONCERNING ABORTION.

Over a decade ago, this Court held that the "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 110, 153 (1973). *See also Doe v. Bolton*, 410 U.S. 179 (1973). That holding was reaffirmed just two years ago in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). As with most rights, however, the right to choose to terminate one's pregnancy is not absolute; rather, it " 'must be considered against important state interests in abortion.' " *City of Akron*, 462 U.S. at 427 (quoting *Roe v. Wade*, 410 U.S. at 154). One of those interests, recognized by this Court as sufficiently compelling to justify governmental regulation of this fundamental right after the first trimester

of pregnancy,[4] is the State's interest in the preservation and protection of the health of women who have abortions. However, even regulations designed to further important health-related concerns must be narrowly drawn and "reasonably designed to further that state interest" in maternal health. *City of Akron*, 462 U.S. at 434. Thus, although informed consent requirements usually further the State's interest in protecting the health of pregnant women,[5] this Court recently struck down an informed consent provision that went "beyond permissible limits." *Id.* at 444.

The limits of permissible state regulation of the abortion decision in furtherance of the State's interest in ensuring that a woman's decision is "informed and freely given and is not the result of coercion,"[6] are defined by two principles, recognized by this Court in *Doe v. Bolton*, 410 U.S. at 191-93, and *City of Akron*, 462 U.S. at 444-45. Those principles require deference to the professional judgment of health professionals involved in counseling the woman and performing the abortion, and respect for the women's constitutionally protected right to exercise her choice unburdened by coercive efforts by the State to inject its policy preferences into her decisionmaking process. *Cf. Maher v. Roe*, 432 U.S. 464, 471-74 (1977). The informed consent requirements of the Pennsylvania Act violate these principles.

Section 3205(a) of the Act, which requires written certification by a woman prior to having an abortion of her "voluntary and informed consent" to the procedure, provides that, absent a medical emergency, a woman's consent to an abortion is "voluntary and informed if and

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[4] Even during the first trimester, regulations having "no significant impact on the woman's exercise of her right [to choose abortion] may be permissible where justified by important state health objectives." *City of Akron*, 462 U.S. at 430. *See also Planned Parenthood Ass'n v. Danforth*, 428 U.S. 52 (1976).

[5] *See Planned Parenthood Ass'n v. Danforth*, 428 U.S. at 65-67.

[6] *Planned Parenthood Ass'n v. Danforth*, 428 U.S. at 85.

only if . . . the physician who is to perform the abortion" [7] provides her with the following information prior to performing the abortion:

> [§ 3205(a)(1)](i) The name of the physician who will perform the abortion;
>
> (ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable;
>
> (iii) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility;
>
> (iv) The probable gestational age of the unborn child at the time the abortion is to be performed;
>
> (v) The medical risks associated with carrying her child to term;
>
> [§ 3205(a)(2)](i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care; and

[7] Section 3205(a) limits the counseling function regarding the information to be provided by subsection (1) to "the physician who is to perform the abortion or [to] the referring physician *but not . . . the agent or representative of either.*" (Emphasis added). APA argued in its *amicus* brief in *City of Akron* that "effective counseling . . . require[s] specialized training. . . . [M]ost doctoral level professional psychologists have received intensive training in interpersonal dynamics and counseling techniques, and most of them would be qualified to provide effective abortion counseling." Brief for *Amicus Curiae* American Psychological Association In Support of Respondents at 14-15. This argument was accepted by the Court and, in light of its holding that it is "unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent," 462 U.S. at 446-49, the Commonwealth conceded the unconstitutionality of this language in § 3205(a) in the court of appeals, and the issue has not been raised before this Court. For purposes of our analysis, we will assume that "much, if not all of [the information]" in § 3205(a)(1) may be communicated to the pregnant woman by a qualified nonphysician counselor. *Id.* at 445-46, n.37.

> (ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

In addition, § 3205(a)(2)(iii) requires that the woman be informed that she has the right to review certain materials "printed" by the Pennsylvania Department of Public Health.[8] Those materials are "designed to inform the woman of public and private agencies and services available to assist [her] through pregnancy, upon childbirth and while the child is dependent, including adoption agencies." § 3208(a)(1). The materials are required to contain a statement reiterating the availability of agencies "willing and able to help you carry your child to term and to assist you and your child after your child is born," and advising the woman further that

> [t]he Commonwealth of Pennsylvania strongly urges you to contact [such agencies] before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

Id. Finally, a woman seeking an abortion must be informed of her right to review "objective, nonjudgmental and [scientifically] accurate" materials designed to inform her of the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival." § 3208(a)(2).

The court of appeals held that the information required by § 3205(a) to be communicated to women seeking abortion, like that required in *City of Akron*, was designed "'not to inform the woman's consent but rather to persuade her to withhold it altogether.'" *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 296 (3d Cir. 1984) (quoting *City of Akron*, 462 U.S. at 444).

[8] The "printed materials" are described in detail in § 3208 of the Act.

Moreover, citing this Court's ruling in *City of Akron*, the court of appeals found that the Act's informed consent provisions impermissibly intruded upon the discretion of the pregnant woman's physician or other counselor to "tailor the information given to her to the exigencies of the case." 737 F.2d at 296. Although noting that some of the provisions of § 3205(a) were "unobjectionable standing alone," the court of appeals, citing *City of Akron*, found those provisions unseverable from the unconstitutional provisions of the section. *Id.* The court also concluded that the "printed materials" requirement of § 3208 was "inextricably intertwined with section 3205, [finding] no certainty of any legislative intent that section 3208 should stand alone." *Id.* at 298. Thus, the court held "the entire statutory scheme" of §§ 3205 and 3208 invalid and unenforceable. *Id.* at 296.

The court of appeals' judgment should be affirmed. Virtually all of the information required by §§ 3205 and 3208 to be provided to pregnant women seeking abortions fits within either the "undesired and uncomfortable straitjacket" category, against which this Court warned in *Planned Parenthood Ass'n v. Danforth*, 428 U.S. 52, 67, n.8 (1976), and *City of Akron*, 462 U.S. at 445, as an impermissible intrusion on physicians' and counselors' discretion, or the "parade of horribles" category recognized by this Court in *City of Akron* as a blatant and impermissible attempt by the State to compel the woman to choose *not* to have an abortion. *Id.*

Effective counseling, which is critical for meaningful informed consent, requires the exercise of professional discretion regarding what *not* to say in any particular situation, as well as what *to* say. The provisions of § 3205 preclude such counseling by "specif[ying] a litany of information that the physician [or counselor] must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." *Id.* For example, the requirement that every woman be informed of "[t]he fact that medical assistance benefits

may be available for prenatal care, childbirth and neonatal care," and the fact that "the father is liable to assist in the support of her child," as provided by §§ 3205(a)(2)(i) and 2(ii), may be irrelevant to a woman for whom an abortion is required as a life-preserving measure. Moreover, the requirement that such information be communicated may interfere significantly with a health professional's ability to counsel effectively such a woman, particularly if she has moral, religious or other personal beliefs that conflict with her decision. Although most women who choose to have abortions suffer no significant depression or trauma,[9] informing a woman who has no other realistic alternative of the potential liability of the father, or the availability of medical assistance benefits, may increase her depression and trauma at having to have an abortion and thereby negatively affect the procedure or her recovery. In these circumstances such counseling is very likely to be irrelevant, insulting and destructive of the trust necessary for an effective counseling relationship. In addition, advising such a woman of "the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable"[10] may be even *more* destructive of the counseling

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[9] *See* n. 11, *infra*.

[10] The Commonwealth argues that § 3205(a)(1)(ii) was upheld by this Court in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). However, because summary affirmances "'affirm the judgment [only, and] not necessarily the reasoning by which it was reached,'" the precedential value of the Court's affirmance in *Fitzpatrick* is limited. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). This is particularly the case in circumstances such as those presented in this case where subseqent decisions of this Court, after lengthy and reasoned analyses, have made clear that provisions such as § 3205(a)(1)(ii) are constitutionally infirm. *See Fusari v. Steinberg*, 419 U.S. at 392 (Burger, C.J., concurring) (citations omitted) ("An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously

relationship, as well as trauma-inducing for a significant period of time before and after the abortion. To the extent that provisions like § 3205 intrude on the physician's or counselor's exercise of professional discretion by requiring the communication of such specific information without regard to the particular circumstances, this Court has struck them down as "unreasonably . . . plac[ing] 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *City of Akron*, 462 U.S. at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604, n.33 (1977)).

Similarly, the requirement that *every* woman be told of the "particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility," § 3205(a)(1)(iii), intrudes on the physician's or counselor's discretion to tailor the information to the needs of each woman. Although *Danforth* upheld a requirement that women seeking abortions be provided *general* information "as to just what would be done and . . . its consequences," 428 U.S. at 67, n.8, it "properly le[ft] the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'" *City of Akron*, 462 U.S. at 447. To require the disclosure to all women of every conceivable risk of the proposed abortion technique, no matter how remote the risk or psychologically damaging the disclosure may be, would be contrary to the currently accepted practice of health care professionals and often would be contrary to the best health interests of the woman. Although this Court has stated that "[c]onsistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion[,]"

announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.").

City of Akron, 462 U.S. at 445, there are many means by which a physician or counselor may ascertain the patient's understanding, and the choice of such means rests well within the scope of his professional discretion. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 322-23, n.30 (1982).

Likewise, the requirements that every woman be informed of the possibility of "detrimental physical and psychological effects which are not accurately foreseeable," and of the "printed materials" provided by the Commonwealth which describe, *inter alia*, the "anatomical and physiological characteristics of the unborn child" are constitutionally defective. Like the "parade of horribles" struck down in *City of Akron*, these provisions are designed more to coerce a woman's choice than to inform it. First, the possibility of detrimental physical and psychological effects resulting from an abortion performed in a competent and professional environment is no greater or less than the possibility of such effects from other unregulated medical or surgical procedures.[11]

[11] Indeed, a great many empirical studies have shown that abortion rarely causes or exacerbates psychological or emotional problems; rather, the great majority of women who have had abortions express feelings of relief. *See, e.g.*, Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 J. NERVOUS & MENTAL DISEASE 417 (1966); Patt, Rappaport & Barglow, *Follow-up of Therapeutic Interruption of Pregnancy*, 20 ARCHIVES OF GEN. PSYCHIATRY 408 (1969); Senay, *Therapeutic Abortion: Clinical Aspects*, 23 ARCHIVES OF GEN. PSYCHIATRY 408 (1970); Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry*, 126 AM. J. PSYCHIATRY 1224 (1970); Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 AM. J. OBSTETRICS & GYNECOLOGY 347 (1971); Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 AM. J. ORTHOPSYCHIATRY 574 (1973); Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 AM. J. PSYCHIATRY 97 (1967); Niswander & Patterson, *Psychological Reaction to Therapeutic Abortion*, 29 OBSTETRICS & GYNECOLOGY 702 (1967).

Moreover, there is some empirical evidence that positive personality changes occur as a result of abortions. For example, researchers have noted improved contraceptive use after abortions,

However, singling out abortion for this recitation of detrimental effects has the purpose and effect of conveying the *misleading* and factually inaccurate impression that abortions are more likely than other procedures to produce such detrimental effects. In *City of Akron*, the Court found that a similar statutory provision was "intended to suggest that abortion is a particularly dangerous procedure," and that finding was a "decisive[] objection" to the provision's constitutionality. 462 U.S. at 445.

Second, the "printed materials" described in § 3208 clearly are designed to deter pregnant women from choosing abortion. Although review of these materials is not mandatory, the characterization of these materials, which a counselor *is* required to convey to women seeking abortions, as descriptive of "the unborn child"—a phrase defined by § 3203 of the Act as "a human being from fertilization until birth and includes a fetus"—is unduly inflammatory, inherently coercive, and violates the teaching of *Roe v. Wade*, 410 U.S. at 159-62, that a State "may not adopt one theory of when life begins to justify its regulation of abortions." *City of Akron*, 462 U.S. at 444. Moreover, notwithstanding the Legislature's intent that these materials be "objective, nonjudgmental and [scientifically] accurate," § 3208(a)(2), they are as "specula[tive]" and coercive, and therefore unconstitutional, as the similar information required by the Akron ordinance and struck down by this Court in *City of Akron*. *Id.*

Although the Court in *City of Akron* found information as to gestational age of the fetus, and the availability of medical assistance during pregnancy and after childbirth, including adoption assistance, unobjectionable

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with women reporting feelings of increased self-directedness, autonomy, and efficiency. *See* Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 AM. J. ORTHOPSYCHIATRY 503 (1977). These findings regarding the psychological effects of abortion on women have been noted for adolescent women as well as adult women.

"to the extent it is accurate, . . . and probably [ ] routinely made available to the patient," 462 U.S. at 445-46, n.37, the requirement that such information be provided in *all* circumstances unduly interferes with the physician's or counselor's discretion to provide appropriate information in a particular case. For example, a victim of incest or rape could be severely traumatized or depressed by recalling the offense—a recollection that necessarily would be triggered by the required advice regarding the gestational age of the fetus—and her physician or counselor should have the discretion to determine that the detrimental effects to the woman from providing such information would outweigh any conceivable benefits. It may be no less traumatizing a reminder for such a victim to be *mandatorily* informed of the availability of prenatal and postnatal medical assistance, once she and her physician have determined that abortion is the only means of ending her nightmare. In such cases, the physician or counselor should be free to exercise professional judgment.

The requirement that this information be provided to *all* women seeking abortions places the physician or counselor who determines that the provision of this information in a particular case would have a detrimental impact on the woman in the "undesired and uncomfortable straightjacket in the practice of his profession" warned against in *Danforth*, 428 U.S. at 67, n.8. However, to construe the Act as containing an implicit distinction between those applications of the informed consent requirements which impermissibly intrude on the counselor's discretion and those which do not, and severing the former, would so eviscerate the Legislature's intent that *all* women seeking abortions be told *all* information specified in the Act, as to "create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

The remaining informational requirements—those which neither impermissibly intrude on the physician's or coun-

selor's discretion nor seek to exert undue influence on the woman's choice—are so few and insignificant that, notwithstanding the Act's severability clause,[12] "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of [those provisions] which [are] not." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 931-32 (1983). *See also Sloan v. Lemon*, 413 U.S. at 834. Those unobjectionable provisions are the requirement that the woman be informed of the name of the doctor who will perform the abortion, and of the medical risks associated with carrying her child to term, §§ 3205(a)(1)(i), (1)(v), and the *optional* requirement that, upon her request, the woman be advised of agencies available to provide post-childbirth assistance, § 3208(a)(1). Standing alone, these requirements do not in any way serve the Commonwealth's interest in ensuring that a woman's abortion choice will be an informed one. Thus, in the absence of the impermissible provisions, these requirements would have so little impact on the Commonwealth's asserted interests that it is extremely unlikely they would have been enacted. In light of these considerations, and, consistent with this Court's holding in *City of Akron*, 462 U.S. at 445-46, n.37, the court of appeals correctly determined that the unobjectionable provisions were not severable from the unconstitutional provisions.

In short, the informed consent requirements of §§ 3205 and 3208 have the substantial purpose and effect of undermining, rather than furthering, the Commonwealth's legitimate interest in ensuring that a woman's consent to abortion is voluntary and adequately informed. As a result, these provisions fail the constitutional standard, established by this Court in *Roe v. Wade*, 410 U.S. at 163, and most recently articulated in *City of Akron*, 462

[12] *See* 1982 Pa. Legis. Serv. 750, 794, § 5 (Purdon).

U.S. at 430-31, of being narrowly drawn and "reasonably relate[d] to the preservation and protection of maternal health." Accordingly, the court of appeals' judgment as to §§ 3205 and 3208 should be affirmed.

II. THE RESTRICTIVE DEFINITION OF "MEDICAL RISK" IN § 3210(b) OF THE ACT IMPERMISSIBLY PRECLUDES CONSIDERATION OF ALL FACTORS RELEVANT TO AN INFORMED DETERMINATION OF MATERIAL HEALTH, AND THEREBY UNDULY BURDENS A WOMAN'S ABORTION DECISION.

Section 3210 of the Act prohibits the knowing performance of abortions of viable fetuses, unless the physician who performed the abortion made a good faith medical judgment that the fetus was not viable at the time of the abortion, or the abortion was necessary to preserve maternal life or health. Subsection (b) of § 3210 requires generally that physicians performing post-viability abortions observe a standard of care designed "to preserve the life and health of any unborn child intended to be born and not aborted." To that end, physicians performing post-viability abortions are required to employ the abortion technique

> which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or the health of the pregnant woman than would another available method or technique . . . . *The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother.*

§ 3210(b) (emphasis added).

The court of appeals held this provision unconstitutional on the ground that the "significantly greater risk" threshold requires the woman to bear an increased medical risk in order to protect or preserve the life of the viable fetus. 727 F.2d at 300. Although the court of

appeals did not decide whether a State constitutionally may exclude psychological and emotional factors from a physician's assessment of "medical risk," the APA respectfully urges the Court to address this issue as an additional, or alternative, ground for affirming the court of appeals' judgment as to § 3210(b).

Since this Court first held that the right to choose abortion is protected by a woman's fundamental right to personal privacy, it has recognized that one of the essential components of that right is the woman's right to exercise her choice in consultation with her physician and other health professionals, who must be given "the room [they] need[] to make [their] best medical judgment[s]." *Doe v. Bolton*, 410 U.S. at 192. Recognizing the broad range of factors that necessarily inform the "medical judgment" of health professionals engaged in abortion counseling, including assessments of "medical necessity," this Court held that "medical judgment" includes "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.* The Court has not narrowed this broad construction of "medical judgment" in its subsequent opinions. Nor has it suggested that its application be limited to consultations regarding *whether* to abort, rather than *how* to abort. To the contrary, the Court recently reiterated its longstanding view that "[t]he physician's exercise of this [broad] medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion." *City of Akron*, 462 U.S. at 427. *See also Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (striking down a statutory provision similar to § 3210(b) for failing to make clear that "*all* factors relevant to the health of the woman may be taken into account by the physician in making his decision" regarding the choice of post-viability abortion techniques) (emphasis added).

The requirement that all factors relevant to a woman's health be considered by a physician in choosing an appropriate abortion technique clearly requires the consideration of psychological and emotional factors. Psychological and emotional health is no less significant to an individual's overall health than is purely physical health. Under the Pennsylvania Act, a woman suffering from severe pain phobias and anxieties could nevertheless be forced by the limitations of § 3210(b) to submit to a Cesarean section operation or labor-inducing infusions to preserve the viability of the fetus, when another technique would not pose so substantial a threat to her mental health. Although very few abortions are performed during the post-viability period, the few that are performed, in the absence of severe medical complications to the mother, are often performed, in part, because the fetus, though viable, could not lead a normal life. For example, amniocentesis may reveal the existence of extremely severe deformities or other fetal disorders with which the woman or her family may be ill-equipped emotionally to cope. To require her to choose a method of abortion that would preserve the viability of such a fetus could be psychologically devastating. Similarly, the Act would require a woman for whom aborting a live fetus might exacerbate existing anxieties, self-destructive tendencies or other psychological or emotional disorders to assume the risk of such disturbances if she can identify no physical health problem that would be significantly adversely affected by the fetus-saving abortion technique. Such results—which may create substantial psychological damage that lingers long after physical wounds have healed—are indeed anomolous in view of the broad definition accorded "maternal health" by this Court and the health profession generally. Thus, § 3210(b), by precluding consideration of psychological and emotional health factors equally with physical health factors, impermissibly burdens a woman's right to choose abortion in consultation with her physician.

Moreover, although mental health and physical health are commonly thought of as two separate components of an individual's health, they are frequently interrelated.

Indeed, the attempt to separate emotional and psychological factors from purely physical factors in assessing the medical or health risks of alternative abortion techniques would be a difficult, if not impossible, task. As health care professionals increase their understanding of human illnesses and treatments, their increased appreciation of the role played by psychological and emotional factors has blurred significantly any distinction between the physical and the psychological in the health care field. Psychological and emotional disorders can result in severe mental turmoil, loss of contact with reality, chronic anxiety, guilt, depression, and self-destructive behaviors, all of which may be manifested in physical symptoms. Indeed, many of today's major health problems, *e.g.*, heart attacks, cancer, strokes, and drug addiction, which previously had been considered purely "physical" in their origins, have been determined to be causally related to psychological factors. Likewise, many physical traumas, including strokes, mastectomies and cancer, have a major impact on the psychological health of individuals. *See generally* AMERICAN PSYCHOLOGICAL ASSOCIATION, PSYCHOLOGY AS A HEALTH CARE PROFESSION at 6-8 (1983).

The interrelatedness of psychological and physical factors is no different in the abortion context. The mental disorders noted above that may result from using an abortion technique that preserves the life of the fetus may create a sufficient risk to the woman's overall health that an alternative method of abortion may be warranted. Under this Court's reasoning in *Doe v. Bolton*, a health care professional's discretion must be broad enough to permit the candid exploration of these factors with the patient, and the consideration of these factors in assessing the "medical risk" to her of the various abortion methods available.

III. THE PARENTAL/JUDICIAL CONSENT PROVISIONS OF § 3206 OF THE ACT UNDULY BURDEN THE RIGHTS OF MINORS TO SEEK ABORTIONS.

Although this Court has held generally[13] that "child[ren], merely on account of [their] minority, [are] not beyond the protection of the Constitution," it has asserted, nevertheless, that "the status of minors under the law is unique in many respects[,]" *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (*Bellotti II*), and has accorded States "somewhat broader authority to regulate the activities of children than of adults." *Danforth*, 428 U.S. at 74. Regarding the constitutionally protected privacy rights of minors, this Court generally has upheld state restrictions serving "any significant state interest . . . that is not present in the case of an adult." *Id.* at 75. *See City of Akron*, 462 U.S. at 427-28, n.10; *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977). This lesser standard of scrutiny has been deemed "appropriate"

> both because of the States' greater latitude to regulate the conduct of children, *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968), and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. *See, e.g.*, [*Danforth*], 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part).

Id. at n.15 (Brennan, J., concurring).[14]

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[13] *See, e.g., Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."). *See also Carey v. Population Services Int'l*, 431 U.S. 678, 692, n.14 (1977) (and cases cited therein).

[14] In *Bellotti II*, a plurality of this Court identified two additional reasons for not equating the constitutional rights of minors

In the context of abortion, this Court has stated clearly that " 'the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor.' " *City of Akron*, 462 U.S. at 439 (quoting *Danforth*, 428 U.S. at 74). Although the State's interest in protecting minors will justify "a requirement of a consent substitute, either parental or judicial," the Court has

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with those of adults: the "peculiar vulnerability" of children; and the importance of the parental role in child-rearing. 443 U.S. at 634. However, as this Court noted in *Bellotti II*, neither of these factors supports a restrictive construction of minors' privacy rights in the abortion context. In view of their "probable education, employment skills, financial resources and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor," *id.* at 642, thus rendering pregnant minors as "peculiar[ly] vulnerab[le]" to the hard realities of carrying a pregnancy to term as they are to the stress of abortion. As a result, to the extent the "vulnerabilities" of pregnant minors require the State to show " 'concern, . . . sympathy, and . . . paternal attention,' " *id.* at 635 (quoting *McKiever v. Pennsylvania*, 403 U.S. 528, 550 (1971)), the neutral application of *that* concern would result in abortion as readily as in continuing the pregnancy.

Likewise, the State's interest in fostering the parental role in child-rearing, to the extent that it "implies a substantial measure of authority over one's children," *Bellotti II*, 443 U.S. at 638, must give way to the mature minor's right to choose abortion independently of parental consultations or consent, or to the best interests of an immature minor. *Id.* at 647-48. *See also Danforth*, 428 U.S. at 75 (citation omitted):

> One suggested interest is the safeguarding of the family unit and of parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

warned "that the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *City of Akron*, 462 U.S. at 439-40 (citing *Bellotti II*, 443 U.S. at 643-44). *See also Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1983). The "alternative procedure" must assure that a resolution of the issue and any subsequent appeals "will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U.S. at 644. Thus, notwithstanding the "legitimate interest in encouraging parental involvement in their minor children's decision to have an abortion[,] . . . these state and parental interests must give way to the *constitutional right* of a mature minor or of an immature minor whose interests are contrary to parental involvement." *City of Akron*, 462 U.S. at 428-28, n.10 (emphasis added).

In developing these standards, this Court necessarily has distinguished abortion decisions of minors from other decision of minors.[15] Indeed, the right to choose abortion, especially as to minors, involves the exercise of a constitutional right of *unique* character. *See Bellotti II*, 443 U.S. at 642-43. The elements recognized by this Court as contributing to the "unique nature and consequences of the [minor's] abortion decision," *id.* at 643, include the inability of the pregnant minor to postpone her decision, and the potentially severe negative impact on the minor of unwanted motherhood, given her "probable education, employment skills, financial resources and emotional maturity." *Id.* at 642. Thus, "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Id.*

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[15] *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979) (upholding parents' right to admit a minor to a state mental institution). *See also Sec'y Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

A. Section 3206 Of The Act Fails To Meet The *Bellotti II* Confidentiality Requirement.

Except for medical emergencies, § 3206 of the Pennsylvania Act prohibits the performance of abortions on unemancipated women under the age of eighteen unless both the woman and one of her parents or person standing *in loco parentis* provide written informed consent to the procedure. Alternatively, the minor may seek judicial authorization for an abortion. § 3206(c). The court is required to authorize the abortion if it determines that "the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." *Id.* If the Court determines that the woman is not mature and is incapable of giving informed consent, it must authorize the procedure if it determines that an abortion is in her best interest. Section 3206 also requires that judicial proceedings pursuant to this section be confidential and be given "such precedence over other pending matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman, but in no case shall the court fail to rule within three business days of the date of application." § 3206(f). Subsection (h) provides for an "expedited confidential appeal" of orders denying authorization for an abortion. In addition, § 3206 requires the Supreme Court of Pennsylvania to "issue promptly such rules as may be necessary to assure that the process provided in [the] section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition." § 3206(h).

The court of appeals found that § 3206 was facially valid, but enjoined its operation until the Pennsylvania Supreme Court promulgated rules to assure the confidentiality of the proceedings and promptness of their disposition. 737 F.2d at 297. On November 26, 1984, the Pennsylvania Supreme Court promulgated "New Orphans' Court Rule 16 Governing Proceedings Pursuant

to Section 3206 of the Abortion Control Act." No. 198 E.D. Misc. Docket 1984.[16]

Although § 3206, as implemented by Orphans' Court Rule 16, meets the expedited hearing and appeal requirement of *Bellotti II*, it fails to meet the "anonymity" or confidentiality requirement. Rule 16.4 provides that "[a]ll persons shall be excluded from the hearings except the applicant, *her parents or person standing in loco parentis*, . . . and such other persons whose presence is specifically requested by the applicant or her guardian." (Emphasis added.) As written,[17] this provision establishes a right in the minor's parents or persons standing *in loco parentis* to attend the hearing, *even if the minor wishes to exclude them.* In addition, it allows her guardian to request the presence of other persons whom the minor may not wish to have present at the hearing. Such a requirement, even assuming the parents or guardians have no veto authority over the mature minor's decision or the court's determination of the immature minor's best interests, impermissibly intrudes on the privacy rights of mature minors to make independent abortion decisions free of parental involvement. *See City of Akron*, 462 U.S. at 441, n.31; *H.L. v. Matheson*, 450 U.S. 398, 420 (1981) (Powell, J., concurring); *id.* at 428, n.3 (Marshall, J., dissenting). Moreover, even *immature* minors are entitled to "go directly to a court without first consulting or notifying [their] parents" for judicial determination of whether an abortion is in their best interests. *Bellotti II*, 443 U.S. at 647. The importance of providing minors, particularly immature minors, with direct access to an independent decisionmaker is especially sig-

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[16] Because of the pendency of this appeal, on February 22, 1985, the district court denied the Commonwealth's motion to vacate the injunction against enforcement of § 3206.

[17] Whatever doubt may have existed as to the Rule's proper construction is dispelled by the statement in the Commonwealth's Brief at 79, that "the proceeding *shall be closed to all but essential persons, such as the minor's parents.*" (Emphasis added.)

nificant in circumstances involving the possibility of parental incest, or in other circumstances in which a minor indicates that, due to her parent's "strong views on the subject of abortion"—and their consequent hostility and obstructive potential toward her contemplated course of action—consultation, notification, or any other involvement of her parents would not be in her best interest. *Id.*[18] *See also H.L. v. Matheson*, 450 U.S. at 420 (Powell, J., concurring).[19] Because the undesired attendance of parents at § 3206 proceedings is necessarily predicated on some kind of notification to them independent of the minor, these considerations, articulated by this Court in the context of parental notification statutes, are equally applicable to the Rule 16.4 provision which precludes the exclusion of parents from such proceedings. As a result, § 3206 impermissibly burdens minors' rights to seek abortions.

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[18] In *Bellotti II*, a plurality of this Court struck down a requirement that an available parent be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion because that requirement imposed "an undue burden upon the exercise by minors of the right to seek an abortion." 443 U.S. at 647. Justice Powell observed:

> As the District Court recognized, "there are parents who would obstruct, and perhaps altogether prevent the minor's right to go to court." There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

Id. (citation omitted).

[19] Of course, the court could determine that a particular immature minor's best interests would be served by parental consultation, and could decline to authorize an abortion on that ground. *Bellotti II*, 443 U.S. at 648.

B. The Requirement That Minors Fourteen Years Of Age And Over Seek Parental Or Judicial Consent For Abortions Does Not Satisfy The *Danforth* Significant State Interest Test.

An even greater burden on these rights is posed by the implicit presumption in § 3206 that, unless otherwise demonstrated, women under the age of eighteen are less capable than adults of making decisions regarding abortion in a reasoned manner. This presumption is not supported by the relevant empirical studies. To the contrary, there is a substantial and growing body of psychological literature which supports the view that by the age of fourteen, most minors do not differ from adults in their ability to understand and reason about treatment alternatives or to comprehend and consider risks and benefits regarding those alternatives. Nor do minors fourteen and older differ in the quality of decisions actually made. *See generally* Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis* in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES (G. Melton ed. in press); Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980).[20]

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[20] *See also* Melton, *Developmental Psychology and the Law: The State of the Act*, 22 J. FAM. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care* in CHILDREN'S COMPETENCE TO CONSENT (Melton, Koocher & Saks ed. 1983); Weithorn, *Developmental Factors and Competence To Make Informed Treatment Decisions*, 5 CHILD & YOUTH SERVICES 85 (1982); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982); Wald, *Children's Rights: A Framework For Analysis*, 12 U.C.D. L. REV. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. SOC. ISSUES 114 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. AM. ACAD. CHILD PSYCHIATRY 505 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOLOGY 412 (1978).

These findings tend to show that the years between 11 and 14 are the transition period during which children develop the capacity to weigh risks and benefits in decisionmaking.

Indeed, the fact that a minor has chosen to abort may show the deliberation, foresight as to consequences, and sense of responsibility that mark mature decisionmaking:

> Minors who seek abortions express reasons similar to those of adults, and demonstrate a comparable appreciation of their dilemmas. Like adults, they are attempting to escape from a potentially shattering, life-long handicap. These minors recognize that childbirth is age-inappropriate. They often wish to continue in regular junior or senior high schools without stigma rather than attend schools for pregnant girls, and some may have longer range ambitions as well. If they are members of fatherless families supported by public assistance, an unwanted pregnancy to term and childbirth may dash their hopes of rising above their mothers' education and socioeconomic status. They may be disillusioned by the inconstancy and unconcern of the biological father, often also a minor, or they may find their pregnancies repulsive as the result of incest or rape.

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251, 1256 (1980) (footnote omitted).

Thus, in view of the Court's reliance on minors' presumed "lesser capability for making important decisions" [21] as the primary justification for requiring women under the age of eighteen to secure parental consent or to initiate judicial proceedings by which they may demonstrate sufficient "maturity" to make an independent choice, these studies call for a re-evaluation of that presumption in order to ensure that the fundamental privacy rights recognized in *Roe v. Wade* are not being applied to minors in an impermissibly restrictive manner, unsupported by "any significant state interest . . . not present in the case of an adult." *Danforth*, 428 U.S. at 75.

As noted above, the "significant interest" recognized by this Court as sufficient justification of statutory

[21] *See supra* at p. 19.

parental/judicial consent procedures such as those at issue in *Thornburgh* is the State's interest in ensuring that a minor's decision to abort is the product of a mature and rational decisionmaking process. However, the studies cited above and at n.20, *supra*, show that there is no empirical basis for concluding that minors fourteen and older are less capable of making informed decisions than adults. Thus, the Commonwealth's interest in ensuring the informed consent of minors fourteen and older is no different from its interest in ensuring the informed decisionmaking of adults.

For example, in a recent study by two noted developmental psychologists, minors aged nine and fourteen and adults aged eighteen and twenty-one were presented with four hypothetical vignettes about individuals suffering from particular medical or psychological disorders, and were asked to choose among several treatment options. The subjects were presented with detailed information about the nature, purpose, risks, and benefits of the alternative treatments, and were asked to choose among them. The subjects were then asked a series of standardized questions about their decisions, and about the vignettes. In most instances, the responses showed no difference between the adults and the fourteen year olds in any of the scales of competency used in the study: inferential understanding (*i.e.*, appreciation), factual understanding, reasoning, reasonable outcome, and evidence of choice. *See* Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982).[22]

These and similar findings by other researchers support the conclusion that there is no factual justification for treating fourteen year old women differently, in this respect, from eighteen year old women. And, "without [the] assumption [of a minor's inability to make reasoned and informed decisions,] there seems to be an inadequate

[22] By contrast, the nine-year-olds were found to perform significantly less well on the understanding and reasoning scales.

constitutional justification for imposing upon her the burden of proving her entitlement to exercise a constitutional right." Dembitz, *supra*, 80 Colum. L. Rev. at 1262 (footnote omitted).

The statutory consent procedures required by § 3206 impose a substantial burden on adolescent women seeking to exercise the constitutional right to choose abortion. Without regard to how simple, uncomplicated, and speedy the procedures may be, or how helpful and courteous the court personnel may be, the burden imposed on a pregnant minor by the requirement that she initiate and prosecute such proceedings, exposing the details of her pregnancy to numerous court personnel, nevertheless remains a substantial burden. Because that burden is not imposed on adult women—individuals whose informed decision-making capacity is not measurably different from that of fourteen year olds—who exercise their right to choose abortion, the imposition of such procedures on minors constitutes an impermissible burden on their constitutional right.

The imposition of such a burden is particularly inappropriate in light of the "unique nature and consequences of the [minor's] abortion decision," which this Court has recognized as a characteristic that distinguishes "the abortion decision . . . from other decisions that may be made during minority." *Bellotti II*, 443 U.S. at 642. In addition to the adverse and substantial consequences noted by the plurality in *Bellotti II*,[23] there are a variety

[23] *See* 443 U.S. at 642:

> The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> Moreover, the potentially severe detriment facing a pregnant woman, see *Roe v. Wade*, 410 U.S. at 153, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

of other negative effects that result from requiring minors to submit to judicial proceedings to secure authorization for abortions. Those effects include self-imposed delays in initiating such proceedings because of embarrassment and the invasion of privacy inherent in petitioning a court; substantial increases in the psychological and medical risks of abortion which may result from such delays; anxiety, embarrassment, and feelings of degradation about discussing such intimate matters with a lawyer and a judge; and the damage to the minor's self-esteem and sense of individual personhood—the development of which are principal developmental tasks during adolescence—which necessarily results from the invasion of her privacy and the requirement that her abortion decision be reviewed and validated by a third party. *See generally* Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis*, *supra*.

In view of these considerations, the Commonwealth has failed to make the showing required by *Danforth* of a "significant state interest" in subjecting the abortion decisions of minors fourteen years of age and older to judicial review when similar decisions by adult women are not subject to judicial review. Accordingly, APA submits that the parental/judicial statutory consent provisions of § 3206 impermissibly burden the rights of women fourteen years of age and older to seek abortions, and respectfully urges the Court to hold § 3206 unconstitutional on that basis.[24]

[24] Consistent with these views, APA urges that States be required to *presume* that minors 14 years of age and older are competent to

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed as to §§ 3205 and 3210(b), and reversed as to § 3206.

Respectfully submitted,

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make their own abortion decisions. However, as with the presumption of an *adult's* competence to provide informed consent to health-care procedures, in circumstances in which the attending professionals have doubts as to the validity or reliability of the patient's consent, judicial or other third-party determination of the issue would be appropriate. Thus, any minor fourteen or older who is seeking an abortion and about whom health care professionals have serious doubt as to her competency to make an informed abortion decision would be required to petition the court for a *de novo* competency determination. As with existing procedures under § 3206, the judge would be permitted to consider whether an abortion would be in the minor's best interest only if he has made a prior determination of the minor's incompetency to make that decision for herself. Such a structure would protect fully the mature minor's constitutional right to an unburdened abortion decision, would serve the State's interest in protecting immature minors from "improvident" decisions, and would serve the additional salutary purpose of freeing judicial resources from difficult and unnecessary inquiries.